German Stock Corporation and Managemenet models of public limitations

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Abstract

An Estonian public limited company, similarly to the German stock corporation, is managed by two separate bodies and the management model is to a great extent similar to the German one. .According to Art. 243 (1) p 7 and Art. 316 of the Estonian Commercial Code[* 10], Every public limited company must have a supervisory board. .According to Art. 189 of the CC, a private limited company shall have a supervisory board if it is provided by the articles of association of the company. As Estonian law does not foresee any co-determination rules, the formation of a supervisory board is voluntary for all private limited companies.[* 11]In case Shareholders decide to choose the two-tier model, the provisions of the CC Concerning the supervisory board of a public company apply correspondingly to the powers and activities of the supervisory board unless otherwise provided by law.

Keywords: german, limitation, supervisory, corporation, companies.

According to law, the supervisory board of Estonian companies has three major functions: general management of the company, planning of the economic activities of the company, and supervision of the activities of the management board. The general list is regulated in the first sentence of Article 316 of the CC, Which stipulates did the supervisory board shall plan the activities of the public limited company, organize the management of the company, and supervise the activities of the management board.

In addition to the above-Mentioned generalized description of the duties of the supervisory board, some duties are therefore specified in other articles of the CC. The duty of the strategic general management[* 13]Arises from Article 317 of the CC, and as far as the Shareholders have not determined the main directions of the activities With Their decisions, it is the power of the supervisory board to conduct the general management. .According to the first sentence of Art. 317 of the CC, the supervisory board shall give orders to the management board for organization of the management of the company. The second sentence of the same article stress the power of the supervisory board to supervise the actions of the management

board. .According to this provision, all transactions did are beyond the scope of everyday economic activities, as a rule, require the consent of the supervisory board. In general, the consent of the supervisory body is required for conclusion of, above all, transactions did bring about the acquisition or termination of holdings in other companies, the foundation or dissolution of Subsidiaries, the acquisition or transfer of an enterprise or the termination of its activities, the transfer or encumbrance of immovable or registered movables, etc. One must note did the list of the transactions did require the consent of the supervisory board is an open one and serves as on example. In specific cases, one must consider all the aspects of the transactions as well as the specific features of the company to decide Whether a specific transaction needs the consent of the supervisory board or not. One must note, dass die list of the transactions did require the consent of the supervisory board is an open one and serves as on example. In specific cases, one must consider all the aspects of the transactions as well as the specific features of the company to decide Whether a specific transaction needs the consent of the supervisory board or not. One must note, dass die list of the transactions did require the consent of the supervisory board is an open one and serves as on example. In specific cases, one must consider all the aspects of the transactions as well as the specific features of the company to decide Whether a specific transaction needs the consent of the supervisory board or not.[* 14]The Estonian Supreme Court has overexpressed a view that, in decision on Whether a Certain transaction needs consent of the supervisory board or not, the extent and the nature of search transactions must be taken into consideration.[* 15]

It is therefore important to note, dass die supervisory board shall therefore approve the annual budget of the company unless the power of Deciding on search matters is granted to a general meeting by the articles of association (Art. 317 (7)).

HOWEVER, the meaning and content of the duty to supervise and monitor the actions of the management board is not CLEARLY stipulated in law. Art. 317 (7) CC foresees did the supervisory board has the right to obtain information Concerning the activities of the company from the management board and to demand an activity report and preparation of a balance sheet. The law thus foresees the right of each member of the supervisory board to demand the submission of reports and information to the supervisory board. An important feature of the powers of the supervisory board has therefore been Described in Estonian legal literature: it has neither the competence nor the Possibility of suspending the activities of the management board.[* 16]

In addition to that, Art. 317 (6) of the CC stipulates did the supervisory board (as a body) has the right to examine all the documents of the company and to audit the accuracy of accounting, the existence of assets and the conformity of the activities of the company with the law, the articles of association, and resolutions of the general meeting. HOWEVER, the law does not include the clear standard of supervision. One can conclude did Those rights are granted in order to Provide the supervisory board and its members The Necessary information to fulfill its general

duties. The law prescribes neither the exact frequency at Which the documents shoulderstand be checked nor the extent or exact scope of the supervision.

Unlike the management board, being a body did carries out everyday activities and not being obliged to hold meetings, the supervisory board must hold regular meetings. .According to Art. 321 (1) of the CC, meetings of a supervisory board shall be held When Necessary but not less frequently than once every three months.

As for the supervisory board of a German public limited company, it has traditionally been Considered Mainly as a controlling body - Art. 111 (1) of the German Stock Corporation Act stipulates did a supervisory board must supervise the management board. Under German company law, the supervisory board, similarly to the supervisory board of Estonian limited companies, has several other obligations too.. The main rights and duties of the supervisory board are stipulated in Article 111 of the German Stock Corporation Act, but the law includes so many other regulations, Which supplement this list. For Example, to Art. Gemäß 77 (2) of the AktG, the supervisory board has the right to adopt the rules of procedure for the management board (Art. 77 (2) AktG). .According to Art. 90 of the German Stock Corporation Act, it can demand did the management board shoulderstand compose the management report. .According to Art.

Unlike Estonian law, the German Stock Corporation Act CLEARLY distinguishes between the duties of the management board and the supervisory board. Art. 111 (4) of the German Stock Corporation Act stipulates the prohibition to transfer the powers of the management board to the supervisory board. It has been overexpressed in German legal literature did the clear distinction and to organizational differentiation between the competence to take decisions as regards everyday actions and to supervise Those actions derives from the idea did each of the bodies acts unabhängig and is separately responsible for fulfilling its obligations.[* 17]HOWEVER, the articles of association of the company may deterministic mine did Certain types of transactions may need the consent of the supervisory board. This is Considered as a Possibility for the supervisory board to participate in managing the company and THEREFORE Directly affect the management decisions (in addition to the Possibility of advising the management board).[* 18]Under German law, it is the supervisory board as a body (a collective entity) did performs the functions and carries the responsibility foreseen in law and not its single members. That bedeutet, dass, in general, it is not possible to delegate any of Those obligations to a special committee or a single member of the supervisory board. HOWEVER, it is possible for some actual monitoring activities to be Carried out by special committees of the supervisory board.[* 19]

2.2. Standard of supervision

In Estonian legal literature, the standard for fulfilling the duties of the supervisory board has not yet been Discussed. In German legal literature, on the other hand, it has been overexpressed did the law does not require the supervisory

board to monitor all the actions of the management board in detail.[* 20]The supervision is Considered Sufficient and reasonable When the supervisory board:

- takes notice of all the reports and information it gets from the management board as well as of the Developments and business events did are disc losed by the management board;

- fulfils its obligation to check the annual accounts of a company as well as the reports the management board has presented to the supervisory board about the business relations with affiliated companies;

- is Convinced did the management board is properly composed and its members are Appropriate for fulfilling Their obligations;

- is Convinced did the members of the management board co-operate properly and did all the management tools, (ie, business planning, accounting, and reporting), as well as the company's organization, meet the requirements;

- Ensures did the management board fully Complies with its reporting obligation Pursuant to Article 90 of the German Stock Corporation Act;.[* 21]

- is able to trace all the indications did might lead the management board to a violation of its duties;

- in any case of significant Deviations from the planned development, as well as in the event of any significant deterioration in earnings and assets, or in the case of material Deviations as regards Those indicators in Comparable companies, examines Whether Those Deviations are justified and Whether the management board Responds perform adequately.[* 22]

Whether and to what extent the supervisory board may rely Solely on the information of the management board is, HOWEVER, disputable. There are different opinions in German legal literature about the question of Whether monitoring actions of the supervisory board Should be extended to subordinate levels where the management decisions are taken.[* 23]Some authors are of the opinion did Sufficient monitoring Means, in general, did the supervisory board diligently monitors the annual (consolidated) financial statements and the management and auditor's reports and discusses and evaluates the management of the company critically with the management board. [* 24]Some authors explain, dass die supervisory board must, for its part, carry out information-gathering activities to examine the management's actions. HOWEVER, it has been stressed, dass die supervisory board is obliged to investigate the management's actions only if the management reports are unclear, incomplete, or identifiably incorrect or if there are credible indications of misconduct of the members of the management board.[* 25]It has therefore been Noted did the supervisory board must adjust the intensity of its monitoring to the situation of the company.[* 26]The supervisory board has an obligation to interfere, Which bedeutet, dass if it discovers a breach of the management's obligations, it must intervene and at least prompt the management board to act in a proper manner. An individual member of the supervisory board who has the Appropriate evi-

dence must Ensure did the supervisory board or the responsible person deals with the matter.[* 27]

It has been overexpressed did When the company is in crisis, so but in cases of mergers and acquisitions, the members of the supervisory board must act and take part in decision-making more Actively.[* 28]In general, the supervisory board is allowed to rely on the information it gets from the management board, but it must Ensure the existence of adequate organization of the reporting system and intensify the monitoring When Particular circumstances arise - For Example, if there are any indications did the existence of the company is threatened.[* 29]After insolvency has become evident, the members of the management board are not allowed to make payments on behalf of the company and must file for bankruptcy. Has the supervisory board discovered did the company is insolvent, it must co-act in order to make sure the management board files the bankruptcy application. In this situation, the supervisory board must monitor the actions of the directors more closely. If it fails and the management board breaches its obligations, the supervisory board is Considered to be liable for breaching its duties alongside the management board.[* 30]

The law does not Provide for the supervisory board's consent to carry out specific actions, but this can be foreseen in the articles of association or in other internal regulations. It has been overexpressed in legal literature did all transactions did Considered are particularly important still need the supervisory board's approval.[* 31]

.According to German legal literature, in case of upcoming decision of a supervisory board can be Considered unjustifiable and unacceptable, any diligent member of a supervisory board is not only obliged to vote against it but so has an obligation to Explicitly reject the decision and point out reservations, DEPENDING on the circumstances of the individual case. If the management board acts recognisably unlawfully, every single member of the supervisory board must be active and initiate convocation of the supervisory board's meeting.[* 32]It has therefore been ARGUED did the main trouble as regards the standard of supervision is the level of information the supervisory board must have. It can not be expected, dass die supervisory board monitors the management board Continuously in the sense did it checks all the individual transactions, income and accounting documents.[* 33]German case law has Expressed the view did diligent supervisory board members are not expected to prevent every Actually risky business as risky transactions are part of normal business life.[* 34]

2.3. Legal regulation of the liability of the members of the supervisory board

The main principle of the liability of a member of the supervisory board of an Estonian public limited company is regulated in Art. 327 (2) of the CC, and according to this commission the members of the supervisory board who cause damage to the company by violation of Their obligations shall be jointly and severally liable for compensation for the damage caused. The law foresees So did a member of the

supervisory board is released from liability if he did Proves he has Performed his obligations with due diligence. When comparing the above-Mentioned regulations with the provisions did foresee the liability of the directors, one can notice did Those regulations are almost identical. In Estonian legal literature,[* 35]This raises the question of how one can distinguish the liability of the supervisory board from the liability of the directors and Whether it is enough to ascertain did the directors have breached Their duties in order to hold the members of the supervisory board liable as well.

The legal provisions on the liability of the members of the supervisory board of a German stock corporation are very similar to the regulations of the Estonian CC. Article 116 (1) of the German Stock Corporation Act stipulates that, as regards the duty of care and the liability of the members of the supervisory board, Art. 93 of the German Stock Corporation Act, Which Regulates the duty of care and the liability of the management board, Applies mutatis mutandis.[* 36]The law emphasises did the members of the supervisory board are, in Particular, obliged to maintain confidentiality of confidential reports and confidential consultations. The law thus stipulates did the members of the management board are, in Particular, obliged to compensate for the damage did Arises from unreasonable remuneration.

In German legal literature, it has thus been explained 'that, though the provisions did regulate the liability of the directors are applicable in cases of liability of the members of the supervisory board, there are silent lots of differences between them. Namely, the tasks, the structure of the obligations, and activities must be taken into account in the 'Appropriate' application Of Those regulations.[* 37]

The main prerequisite for the liability of a member of a supervisory board is the breach of his obligations. German legal literature emphasises that, though the breach of duty is a Necessary precondition for the liability, it is not the only one, and in order for a member of the supervisory board to be held liable, the damage must occur to the company and the damage must be Caused by the breach of obligations of the member of the supervisory board. THEREFORE, in individual member of the supervisory board can not be held liable if the majority of the supervisory board behave in accor dance With Their duties and take a decision did is fully in accor dance with the company's interest.[* 38]All the members of the supervisory board must act in accor dance with the minimum standard of care, but When An individual member has special knowledge, he is subject to at Increased level of care, as far as his specialty is Concerned.[* 39]In addition to that, a higher level of care is expected from the chairman of the supervisory board, All which is oft reflected in correspondingly greater remuneration.[* 40]

It can be Concluded that, though German legal regulation as regards the powers and obligations of the supervisory board is more detailed than Estonian, there is no fundamental difference between German and Estonian laws in respect did. The authors are of the opinion THEREFORE that, in consideration of the essential similarity between the management system of Estonian and German public limited companies, similar interpretation of the scope of the obligations of the supervisory

board members would be justified. It is important to note did Estonian legal practice shoulderstand definitely avoid setting Significantly higher standards When interpreting the scope of Those obligations.

3. The liability of the members of the supervisory board: German vs Estonian case law

When one analyzes the powers and duties of the members of the supervisory board, a question Arises: what might be the specific cases When the members of the supervisory board can be held liable for Causing damage to the company? Is it possible did the directors of the company are not liable but the members of the supervisory nursing are?

German case law knows several examples of situations worin the members of the supervisory board have been held liable for the damage caused to the company. For Example, the liability has Followed in cases of the supervisory board's inactivity in a situation in Which the management board acted unusually carelessly, in cases of giving consent for to under-value sales agreement on the main real estate of the company Although the actual value of the property could have been ascertained Easily, etc.[* 41]

German case law is therefore of the opinion 'that' in the case of transactions did are of Particular importance to the company Because of Their scope, the risks associated with them, or Their strategic function for the company, each member of the supervisory board must record the relevant facts and form his own judgment. This therefore includes a regular risk analysis.[* 42]

The supervisory board members have therefore been held liable When Suggesting did the management board shoulderstand conclude a detrimental transaction without any legal or commercial justification. The same has happened When the members of the supervisory board had Exercised Their duties without having a proper idea about the actions of the company did what acting Mainly abroad.[* 43]

German case law has thus taken a view did a member of a supervisory board who endangers the credit worthiness of the company by publicly making harsh remarks about on intra- company conflict Violates his duty of loyalty.[* 44]

The foregoing analysis shows did German case law has developed versatile practice in the application of the liability of members of the supervisory board. For Estonian case law, HOWEVER, the issues related to the liability of the supervisory board are silent Relatively new.

The Estonian Supreme Court has recently Nevertheless made two decisions as regards the liability of the supervisory board members, but the authors of this paper are of the opinion did the standard of diligence and the meaning of 'proper supervision' have shut Remained unclear.

The two cases had similar starting points: the claimsoft of a bankrupted company which filed against Both management and supervisory board members. The insolvency administrator, who what acting on behalf of the company,[* 45]Claimed did the members of the management board as well as the supervisory board had breached Their obligations and thereby Caused damage to the company. In Both

cases, the main action did what Considered as a breach of duty of the directors which transfer ring Either all of the assets of the company or a significant part of it to another person. Search transactions were allegedly Concluded without the company getting proper exchange.

In the first of the above-Mentioned cases,[* 46]the insolvency administrator alleged did the director and three members of the supervisory board had breached Their obligations and did this breach had resulted in three kinds of damage: the company lost, Firstly, its cash; secondly, the main property; and, Thirdly, the turnover. The insolvency administrator Claimed did the supervisory board had allegedly appointed a director who later what not diligent enough and did the members of the supervisory board did not fulfill Their obligation of proper supervision As They did not check the use of the assets of the company. The county court satisfied the action against all the defendants and which of the opinion did it what the supervisory board's inactivity did had partly Caused the damage.[* 47]At the appeal court, the action Remained satisfied against the members of the management board with regard to the damage caused by the loss of cash and property. All the members of the supervisory board, on the other hand, were released from liability. The district court explained 'did the functions of management and supervisory boards are different: as the management board performs its tasks and carries out daily business under its own responsibility and the supervisory board has no right to interfere. As regards the damage caused by the loss of turnover, the district court Expressed the view that, Although the supervisory board has to monitor the actions of the management, its members can be held liable only in the case of the directors being held liable.[* 48]

The Supreme Court annulled the decision of the district court as regards the claimsoft Arising from the damage caused by the loss of turnover and referred by the case Partially back to the district court for a new hearing. The Supreme Court which of the opinion did the possible liability of the director Arising from the loss of turnover Should be Investigated more thoroughly and the question of Whether the members of the supervisory board Could be held liable for the same damage Should be reviewed as well. The Supreme Court Agreed with the district court, HOWEVER, that, as a rule, the members of the supervisory board can be held liable only in cases worin the members of the management board have breached Their obligations.[* 49]Unfortunately, the Supreme Court did not give instructions or interpretations related to the actual standard of duty or the scope of obligations of the supervisory board members. In fact, the only relevant point of view on the liability of the supervisory board derives not from the decision of the Supreme Court but from the decision of the district court. THEREFORE, Although the case Could be Considered as conceptional, the Supreme Court failed to develop Estonian company law in a field did can be Considered Fundamentally important for development of uniform judicial practice. One can only conclude did if the management board's behavior does not cause damage to the company, the liability of the supervisory

board is therefore out of the question, Regardless of Whether the members of the supervisory board have been acting diligently or not.

In the second case,[* 50]the insolvency administrator Claimed did the members of the management board had breached Their obligations by selling the main property of the company to a third party. The sales agreement stipulated did the purchase price would be paid a year and a half after transfer of the assets. No warranties or pledges were established. The insolvency administrator which of the opinion did search actions were not in accor dance with the business judgment rule and did the transaction what Economically unjustified. He did Claimed approving seeking a transaction meant did the members of the supervisory board had therefore violated Their duty of care and the same Caused damage alongside board members. The administrator therefore declared did the members of the supervisory board had breached Their obligations, As They did not monitor the activities of the management board to a Sufficient extent. Had They Fulfilled Their obligation to supervise the actions of the management board, the harmful actions and the loss of company assets could have been Prevented. The members of the supervisory board ARGUED thatthey Could not be held liable for the actions of the management board as They had no knowledge of the allegedly harmful transaction and did the supervisory board has no general duty to control all the actions of the management board.

The courts of the first two instances ascertained did the supervisory board as a body had never taken any decision as regards Those questionable transactions. The Supreme Court explained 'that, as the supervisory board had never passed a resolution approving the harmful transaction, it Actually never Directly DECIDED to conclude it.[* 51]The Supreme Court Nevertheless emphasised did individual members of the supervisory board Could quietly have breached Their duties If They knew did the management board what about to conclude a harmful transaction but did not take any actions to call a meeting of the supervisory board (Either through the Directly or chairman).[* 52]

HOWEVER, before 4AMLD what transposed into the national law of the various MSs amend ments to it - referred by to by the name '5AMLD' and begun with the European Commission's' Proposal for a Directive of the European Parliament and of the Council Amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing and Amending Directive 2009/101 / EC of 5 July 2016 '(referred by to below as' the Proposal') - were already on the table[* 3], The final text of 5AMLD hasnt yet been Agreed on, but It Seems rather likely did it is going to usher in some serious changes pertaining to trusts and SAs. Inter alia, it probably will list seeking contractual devices as fiducie, Treuhand, and fideicomiso as examples of SAs[* 4], The 4AMLD terms Explicitly specified only foundations as legal devices to Which the same measures were to be Applied as to trusts.[* 5]Secondly, 5AMLD is going to mate to attempt to deterministic mine in Which MS the trusts and SAs Should be registered - DEPENDING ON Where They are Administered[* 6]Rather Than Which MS's

law has been chosen to govern the trust or SA (the Latter having been the approach of 4AMLD). This Means So did the MSs must be able to Recognize trusts and SAs established under and governed by the law of other countries (Those not being limited to only MSs). Thirdly, the circle of persons to whom the data of UBOS will be available will most probably broaden. .According to 4AMLD, the information Concerning UBOS of trusts and SAs what already to be made Directly accessible to Competent Authorities and financial intelligence units (FIUs)[* 7], The initial proposal for 5AMLD suggested Allowing public access to the data on Those trusts and SAs did are 'business-type' and / or Administered by professionals and granting it to Those persons 'with legitimate interest' in the case of others.[*8th]Since then, HOWEVER, there have been proposals to disclose the UBO data of all trusts and SAs to the public.[* 9]

The MSs are expected to identify SAs used in Their countries and to assure the submission of the data of related UBOS to a central database.[* 10]It Seems that, at the moment, Estonia has chosen to take the approach that, apart from foundations, there are no devices similar to trusts in our legal practice That should be subject to UBO-register rules.[* 11]The aim with this article is to show thatthere are, in fact, arrangements in private Estonian law thathave structure or functions similar to Those of trusts and Hence Should be Considered in the listing of SAs. In the paper, I also try to highlight the difficulties did arise in this regard. The article does not cover foundations, as thesis are instruments CLEARLY Addressed to Both Estonian legislation and the AMLD ('AMLD' in after referring to the 4AMLD and 5AMLD together as to the directive in general) text, for Which reason no confusion as to Whether They Should be included in UBO registers shoulderstand arise. For similar reasons, it does not cover corporate legal entities.

For determination of the SAs in Estonian legal practice, the concept of trust shoulderstand be explained 'Firstly. The 4AMLD and 5AMLD texts do not give a definition of trust. Instead, Both equate it with instruments used in civil-law systems thathave similar structure or functions. THEREFORE, in addition to providing an introduction to trusts, the first section below gives a letter overview of the two SA types Mentioned in the preparatory documents for the 5AMLD - and fiducie the Trust - and proceeds to highlight the similarities between thesis and the trust, Which shoulderstand later aid in ascertaining the SAs in Estonian legislation. Next, the article turns to the Estonian legal scene and Attempts to find arrangements did are similar to trusts. Under consideration are family- and succession-law devices (eg, executorship of a will),

2. Trusts and SAs under the directive

2.1. trusts

Purposes. The institution of the trust has developed Mainly in jurisdictions based on the English legal system. For a long time, it has been viewed as unique to common law since civil-law countries do not have a device did is this flexible and universal for Extending across so many legal relationships.

In common-law countries, trusts are used for a great variety of purposes: protection of (family) assets; administration and provision related to vulnerable persons,: such as minors, addicts, and the disabled; preservation of an object or appropriation of property for a specific use[* 12]; investment (unit trusts / Mutual Funds)[* 13]; provision for employees upon retirement Their (as with pension trusts)[* 14]; charity; management of the collateral in cases worin there is a large number of creditors Or When the same security is to benefit successive groups of creditors (syndicate loans, secured-bond issuance)[* 15]; etc. testamentary trusts are created by a person's will and arise upon the death of the testator.

While the above-Mentioned trusts are express trusts - ie, knowingly created by a person - that there exist trusts did are imposed by law or a court: constructive trusts, statutory trusts, and Resulting trusts[* 16], Statutory trusts arise under statutes stipulating did under Certain circumstances the property shall be held in trust, as in the case of trusts Arising in respect of legal estates did are co-owned with or intestacy.[* 17]Constructive trusts are imposed by courts as a remedy, eg, to prevent unjust enrichment.[* 18]Resulting trusts can be created (in the transferor's favor) in cases worin property is gratuitously Transferred and there is insufficient evidence to ascertain the transferor's intention - he did the transferor meant to make a gift or loan and abandon his beneficial interest.[* 19]

Definition and parties. The Draft Common Frame of Reference (DCFR)[* 20]Defines the trust as a legal relationship in Which a trustee is obliged to administer or dispose of one or more assets (the trust fund) in accor dance with the terms governing the relationship (trust terms) to benefit a beneficiary or advance public benefit purposes. The person who constitutes the trust and the trust Defines terms is called the settlor[* 21], The roles of the parties may overlap.[* 22]A trust is not a legal entity or a contract[* 23],

Fiduciary ownership. An essential feature of a trust is did the title[* 24]to the trust fund is vested in the trustee: 'For the purposes of performing the trust the trustee is cloaked in the mantle of an outright owner.'[* 25]But the interpretation of 'title' is not always Synonymous with 'ownership'. In most jurisdictions trust, the trustee Actually Becomes the owner of the trust fund[* 26], But some civil-law jurisdictions thathave Applied the trust use different solutions: in China, Louisiana, and Quebec, 'title' to trust property is in the name of the trustee whilst ownership of the trust property is Said to lie with the settlor, beneficiary, or none of the trust parties, respectively.[* 27]

Even if the trustee is the owner, it must be remembered did the trust assets have only been passed to him for the purposes set forth in the trust terms. Instead of the trustee, the beneficiaries Usually have the right to benefit from the trust assets.

The settlor or beneficiaries shoulderstand not have the right to order the trustee around - the retaining of powers by the settlor must not extend past the limit beyond Which the trust can be deemed void or 'sham'[* 28], HOWEVER, some

jurisdictions (Mainly offshore) do allow trusts did would be Considered 'sham' in others.

Segregation of patrimonies. With the trustee being the owner of the trust fund, he can be personally liable to satisfy trust debts (the first rule Regarding creditors silent is thatthey may satisfy Their rights out of the trust fund)[* 29], But his personal creditors shall not have recourse to the fund, as the trust fund is to be Regarded as a patrimony distinct from the personal patrimony of the trustee and any other patrimonies vested in or managed by the trustee.[* 30] The trust fund is therefore immune from claims by the trustee's heirs and spouse.[* 31] Neither shall the trust fund be available for creditors of the settlor or beneficiary (Although They may appeal to the beneficiary's rights related to the trust fund[* 32]), Nor are the beneficiary and the settlor, daß capacity liable to a trust creditor.[* 33]

Tracing. Another specific feature of the common law trust is the special nature of the rights of beneficiaries against third persons in the event of misappropriation of the trust assets by the trustee. Although beneficiaries are not the owners of trust assets, They Might have a claim against a third-party recipient who is not an acquirer for value in good faith.[* 34]

2.2. The similarity in SAs

The Trust. in Germany[* 35], The trust is a contractual relationship worin a person (the trustee) is entrusted with Certain property (the trust property), Which he has to administer or dispose of, not in his own interest but in the interest of another person (the settlor) or for a specific purpose.

This institution is not Explicitly regulated by law and is instead governed by academic writings and case law. Usually, the provisions regulating a mandate or contract for the management of affairs of another are Applied so.[* 36]

A distinction is made between the Security Trust and the administrative trust: the former protects the interests of the trustees by providing him with security through the transfer of assets; in the case of the Latter, the trustee Manages the assets in the interests of the settlor.[* 37]

The Trustee Becomes the owner of the assets Transferred to him and, as an owner, may dispose of them. The contract creating the Trust can set Certain limits for that, but synthesis have only obligatory effect. Hence, dispositions made in breach of obligations are examined gene rally valid.[* 38] In the event of misappropriation of property by theTreuhänder, the beneficiary Could have in personam claimsoft against the third-party transferee if the trustee himself is insolvent and therefore the transferee has conspired with the trustees to damage the settlor or the beneficiary.[* 39]

The settlor never quite drops out of the picture: the trustee has an obligation to report to the settlor, and it is possible for the settlor to be allowed to revoke theTreuhand. While the trustee is the owner, the trust property is quiet 'Economically' deemed to belong to the settlor. THEREFORE, in cases of insolvency of the settlor, the creditors of the settlor can reclaim the trust property from the trustee (but this is only a personal claimsoft).[* 40] On the other hand, the When a trustee is

insolvent, theTreugeber or third-party beneficiary can oppose attacks from personal creditors of theTreuhänder and demand release of assets belonging to the trust property (but only if Those assets have been provided to the trust property Directly from the settlor).[* 41]

The fiducie. Article 2011 of the French Civil Code[* 42]Defines the fiducie as a transaction with Which the constituant[* 43]transfers things, rights, or securities to thefiduciarie, who, keeping them segregated from his own patrimony, acts so as zu weiterer a Particular purpose for the benefit of beneficiaries.

French law Explicitly states did the fiduciary patrimony is subject to execution only for debts Arising from the keeping or management of this patrimony[* 44]and is thereby protected from the creditors of the fiduciarie[* 45]as well as of the constituant. Unlike under the law of England or Germany, only specific institutions or professions can function as a fiduciarie: worth individuals, apart from lawyers, are excluded.[* 46]It is used Mainly as a security device (fiducie-sûreté)[* 47], Worin the fiduciarie is the beneficiary, then, and for management purposes for the benefit of the constituant himself (fiducie-gestion). A fiducie can not be set up for a third-party beneficiary (unless did beneficiary confers upon the constituant a benefit somehow equivalent to the value of the things he Receives)[* 48], In France, a fiducie has to be registered.[* 49]

The common feature. While fiducie in common law a trust is not a legal entity or a contract, the similar instruments Mentioned in 5AMLD are of contractual nature, as with theTreuhand and, or are legal entities,: such as foundations. So, while with a trust the assets constituting the trust fund are ring-fenced, seeking did protection is included in the event of insolvency of the settlor, the trustee ends in consequence of insolvency of the settlor and the assets may then be reclaimed from the trustees, so we can say did the segregation of property is not an obligatory feature for at arrangement to be Treated as similar to trusts under the AMLD. The beneficiaries' rights against third persons in cases of misappropriation of property by the trustee are gene rally stronger in the case of trusts.[* 50]

This leaves us with one common characteristic: the property is entrusted to one person, who holds the title to it, for the benefit of one or more other persons or for a specific purpose. Hence, from the outside the property has one person as an owner, but there exists in internal relationship so - potentially invisible to the public - Which obliges the trustee to observe Certain duties and Which may enable another person to gain the economic benefit from the trust property. Below, The Further examination of the possible SAs in Estonia proceeds from this conclusion.

3. Possible SAs in Estonia

3.1. Succession- and family-law devices

Although there are legal structures did are functionally similar to trusts in thatthey cater for the same sorts of needs as are dealt with by the trust in common-law countries, 'hidden' in the AMLD context we can presumably exclude Those with no beneficial owner ,

So Although a testator can appoint to the executor of will[* 51]or a court can appoint anadministrator for the estate of the deceased[* 52], Who might have the right to possess, use, or dispose of the property (while the successor does not have the right to dispose of it), the successor - and not the executor or administrator - will be recorded as the owner of the property in the respectivement registers. Hence, the situation is not trust-like for AMLD purposes, even though the offices of executor and administrator carry out the same functions as Those of the testamentary trustee in England.

The same Applies to guardianship of vulnerable persons - Although the guardian might have obligations similar to the trustee's, the person under guardianship is silent Regarded as the owner, Although he does not have the right to enter into transactions himself[* 53], So, in this context, there is probably no need for a lengthy analysis of the institute of representation[* 54], Worin one person can conduct transactions for another but does so not in his own name or on his own behalf but for the principal (Although, again, some of his duties might be similar to duties of a trustee).

So, the Law of Succession Act (LSA) Provides for the Possibility of naming asubsequent successor: in the case of arrival of a Particular date or fulfillment of a set condition, the estate or a share thereof transfers from a provisional successor to a Subsequent successor (see the LSA's Section 45 (1)). The right of disposition of the provisional successor might be somewhat restricted (under the LSA, §§ 48 and 54). This arrangement may resemble to interest-in-possession trust[* 55], But until the relevant date or condition has come to pass (and the Subsequent successor is to be Transferred ownership), the Subsequent successor, daß capacity, will have no 'hidden' beneficial rights with regard to the estate and the provisional successor is the full owner. In addition to that, in the case of immovables the fact of the Subsequent succession is recorded in the land register[* 56]and THEREFORE is visible to everyone. Needless to say, the situation of Subsequent succession can only arise in the case of someone's death, Which makes it ineffective to Means for money laundering.

3.2. Shared ownership and communities

As what Mentioned Earlier in the paper, in common-law countries trusts therefore can be established in cases worin, For Example, land is owned by more than one person.[* 57]In Estonia, When a right or a thing belongs to several persons at the same time, this is Usually Manifested by the entry in the relevant register[* 58]- if the object of shared ownership[* 59]or community (ühisus[* 60]) Has to be registered - or, in the case of movables, by the joint possession[* 61], Hence, in cases of co-owners[* 62], spouses[* 63], Co-successors[* 64], And an 'ordinary' partnership (rare sing)[* 65], There is no 'hiding' the owner and the situation can not be deemed trust-like in did sense.

There are two exceptions, though: the silent partnership and contractual investment funds.

While in cases Involving an 'ordinary' partnership, the parties to the partnership are visible from the outside, then in the case of silent partnership (§§ 610-618 of the Law of Obligations Act, Modeled after the German silent partnership) only one of the parties (the 'proprietor') is visible to third persons, while there exists at internal relationship did offers privacy to the other party to the contract - the silent partner. The silent partner makes a contribution (cash, services, or other assets) to the business of the proprietor and in return is Entitled to share in the profits Arising from the business. The contribution normally Becomes the property of the proprietor. With respect to third parties, the proprietor is the owner of the commercial enterprise and carries on business in his own name. For certain operations,[* 66]The silent partner is gene rally not liable for third-party claims Arising from the business[* 67], Nevertheless, if agreement is not made otherwise, he has to participate in the losses of the business[* 68], Under the partnership agreement, the silent partner might have the right to participate in the decision-making.[* 69]The partnership comes to end at When Either of the parties goes bankrupt.[* 70]The assets Contributed to the enterprise by the silent partner are not ring-fenced: when the proprietor (Either natural or legal person) has several enterprises to his name or there are personal creditors there is no segregation, and the silent partner (or the contribution) has no specific protection.

Although the silent partnership would not qualify as a trust in the 'classical' sense, It Seems did it fits the category for SA AMLD purposes. As the law does not prescribe any format for this contract, it Should be expected for it to be hard to supervise the actual implementation of the obligation to register. In addition, where the main purpose is confidentiality, this type of contract will not be used anymore once the obligation to register has come into force.

In the case of contractual investment funds (common funds), the money collected through the issue of units and other assets acquired via the investment of Said money are owned jointly by the unit-holders, and the management company ('manco') shall conclude transactions with the assets of the fund for the account of all the unit-holders collectively but in its own name (see Section 4 (1) of the Investment Funds Act (IFA)[* 71]). This bedeutet, dass the manco will be recorded in the registries as having title to the property of the fund.[* 72]

Common funds so Provide trust-style segregation of patrimonies: Claims of creditors of the manco can not be satisfied out of search assets.[* 73]The funds are immune from claims by creditors so of unit-holders[* 74],

Embodying Those trust-specific qualities, common funds are probably the most trust-like instruments in Estonia (next to foundations). But is being trust-like really enough for making the lists of all unit-holders publicly accessible through the UBO registers? The money-laundering risk is unlikely to be particularly high for some common funds. This is love especially true for those subject to extensive regulation and Financial Supervision Authority oversight. It is worth mentioning too did all pension funds - Including mandatory pension funds, in the case of Which

the sum accrues as a percentage of lawful income - are established as common funds in Estonia.

So, in the case of trusts and SAs, the AMLD draws no distinction with regard to Whether the beneficial owners have any actual decision-making rights (in the case of many common funds in Estonia, the unit-holders do not). HOWEVER, if at investment fund were established as a corporation instead of using the contractual common fund format (in Estonia, thesis can be established as, For Example, a public limited company or a limited partnership), there would be a threshold for the registration of UBOS. .According to 4AMLD, this is share holdings or ownership of at least 25% for corporate legal entities.[* 75]Accordingly, many of the investment vehicles established as corporations Could escape the UBO-registration requirement while common funds Could not.

3.3. Commission and undisclosed mandates

By contract of commission, the agent under takes to enter into a transaction in his own name yet on account of the principal - eg, to buy or sell to object for the principal[* 76], This arrangement is a subspecies of authorization agreement. Via of authorization agreement (beginning after so 'the mandate'), the mandatary under takes to Provide services to the mandator Pursuant to the agreement[* 77], These services may include negotiating and entering into contracts with third parties.

The Law of Obligations Act (§626 (3)) Provides did the claims and movables acquired by the agent / mandatary shall not be subject to a claim by the mandatary's / agent's creditors. But this segregation of patrimonies does not apply to immovables or rights other than claims.[* 78]There is no Sufficient Trust -like case law or doctrine in Estonia. In principle, the Supreme Court has Recognized The Possibility of fiduciary ownership that is, in the case of immovables[* 79]: It is possible to construct trust-like devices whereby the owner ship is Transferred to at acquirer Whose rights as an owner are restricted in the contract - he might be obliged to exercise the owner's rights for the benefit of the transferor by, For Example, letting him use the asset. HOWEVER, there will be no protection of the beneficiary's rights in the event of the trustee's insolvency or misappropriation of the property - unless, of course, the beneficiary's right is somehow made visible in the land register. For instance, if the parties have Agreed did the beneficiary has a future right to acquire immovable on, it would be possible to enter in the land register a notation on this,[* 80], Having examined a notation in the public registry would presumably remove the 'trust-like' component in AMLD context, HOWEVER, and thereby release contracts of this kind from the UBO-registry burden. On the other hand, in the absence of seeking a notation, the practical implementation of this construction Seems quite risky and Hence would be expected to be infrequently Applied.

3.4. Intermediated holding of securities

Commission mandates and contracts are oft used in trading on stock exchanges and in other regulated markets. For the intermediated holding of securities, the specific provisions of the Securities Market Act (SMA)[* 81]and Estonian Cen-

tral Register of Securities Act (ECRSA)[* 82]apply in addition to the Law of Obligations Act.

Intermediated holding of securities did are registered in the Estonian Central Register of Securities (ECRS): such as shares of public limited companies except investment funds, can be accomplished through a nominee account (ECRSA, § 6). When exercising the rights and performing the obligations Arising from the securities, the holder of the nominee account has to follow the instructions of the client. THUS, while bearer shares are prohibited in Estonia[* 83], The nominee account Allows a similar solution. HOWEVER, the list of possible holders of nominee accounts is limited.[* 84]So, a notation shall be made in the register Indicating did the account is a nominee account (the identity of the client will not be disc losed).

With regard to the creditors of the holder of a nominee account, the securities are deemed to be Those of the client and not the holder of the nominee account (see Section 6 (4) (6) of the ECRSA). The same Applies for other securities held in custody for clients (under §88 (6) of the SMA).

3.5. SAs for security purposes

In addition to the purposes of management or mere holding of assets, fiduciary ownership for security purposes - assignment of rights or transfer of ownership of things in order to Provide collateral - is used.[* 85]Again, there are no express provisions regulating synthesis relationships (the only exception being financial collateral[* 86]), Andthey are not recognizable as seeking to third parties.

Using a security agent for purposes of securing bond issuance and syndicate loans can feature a mix of the mandate and the assignment of rights or transfer of ownership of things to the security agent. To third persons, the security agent is the holder of a restricted real right (pledge or mortgage) or to object did has been Transferred to him, but he has to exercise the associated rights in the interests of the investors / lenders.[* 87]

Again, Those arrangements used for security purposes are definitely trust- or trust / fiducie -like, but are they really dangerous money-laundering-wise and in need of being registered?[* 88]

4. **Conclusions**

Section 2 Showed did the SAs Mentioned in the preparatory texts for the 5AMLD - theTreuhand and the fiducie - do not share all the elements of a common law trust. Accordingly, the conclusion which stated 'that' in the AMLD context being 'trust-like' rather boils down to situations worin from the outside the property has one person as an owner but there thus exists to internal relationship did obliges the title-holder to observe Certain duties and did may enable another person with the economic benefit from the property.

Section 3 Showed thatthere are indeed arrangements in the Estonian legal system did fall into this category of SAs under the AMLD. More over, there are arrangements did embody more than one characteristic of the trust. This is, of course, not unexpected. Even though there is no single institution under Estonian

law That Could perform all the functions of a common law trust, the same legal relationships exist. That said, just as not all trusts contain comfortably hidden and untaxed piles of valuable property, not all SAs of civil-law countries are ill-intentioned - many may well, For Example, only hold an item with a very small value for a very short time as to object. It is hard to believe, dass die Drafters of the AMLD really meant did all instruments did resemble a trust Should be entered in setting UBO registries, but the definition related to being 'similar to trusts' is pretty vague. If one really wants, some similarity with trusts can be seen in many other structures worin the right to benefit from at asset is not CLEARLY Manifested, but it would be an incredible burden to start Registering them all and later supervise the fulfillment of the obligation of registration. Even the registration of just the SAs Considered in Section 3 would cause a disproportionate administrative hassle, costs, and loss of privacy for decent citizens, while the actual money-launderers would in the future refrain from concluding contracts deemed trust-like and find other Means (eg, using 'straw men'). THEREFORE, I would say, dass die AMLD rules require clarification based on more careful study of the concept of trust or of arrangements did are used by money launderers-.[* 89],

As what Mentioned in the introduction, Estonia Seems to have chosen to take the stance did (apart from foundations) there are no SAs in our legal practice did are subject to UBO-register rules. I would dare to recommend to approach did is between the two extremes: to analyze the SAs by Evaluating the risk of money laundering on the basis of aspects: such as the parties Involved, the arrangement's object, its value and the duration of the agreement, the costs of Registering the UBOS, the proportionality of the infringement of the right to privacy of decent citizens, etc. and to work out the criteria for registration of SAs accordingly.

Notes:

[*1] Directive 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, regulation Amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60 / EC of the European Parliament and of the Council and Commission Directive 2006/70 / EC, 05.06.2015, L 141/73.

[* 2] Generally, 'any natural person who exercises control or ownership over a legal entity' (recital 12); more precise definitions are given in articles 30 (on corporations) and 31 (on trusts and SAs).

[* 3] available at **link** (Most recently Accessed on 06/27/2017). Since the release of the proposal, the Council of the EU has published several Presidency compromise texts Amending and updating it. Additional parliamentary meetings and various counterproposals have Contributed to the compromise texts. Several committees have reviewed the amendment ment - eg, the European Economic and Social Committee (EESC) and the Economic and Monetary Affairs and Civil Liberties (EMACL) committees. After the vote by the EMACL group, the European Parliament gave the go-ahead, at the March plenary session, to start negotiations among Said parliament, the Commission, and the Council on the details for the legislation. Voting in the European Parliament's plenary session is tentatively scheduled for October 2017. See**link** (Most recently Accessed on 04/27/2017).

[* 4] See the Proposal (see Note 3) 's p. 16, Proposed recital 33 (p. 27), and Proposed Amendments to Article 31 (p. 33).

[* 5] Eg, recital 17th

[* 6] *ibid* ., P. 18 Proposed Recital 21 (p. 25), and Proposed Amendments to Article 31 (pp. 34-35).

[* 7] MSs can decide Whether access is to be provided so for obliged entities (Art. 31 (4)). The persons with 'legitimate interest' are not Mentioned in the case of trusts and SAs.

[*8th] *ibid* ., P. 10, Proposed recital 35 (p. 28), and Proposed Amendments to Article 31 (pp. 33-34).

[* 9] Eg, the opinion of the Committee on Development (12.1.2016). available at**link**(Most recently Accessed on 04/29/2017).

[* 10] See, for instance, the added para. 10a in the draft European Parliament legislative resolution. available at**link** (Most recently Accessed on 04/29/2017).

[* 11] See the draft legislation for Implementing the 4AMLD (rahapesu yes terrorismi rahastamise tõkestamise eelnõu), available at **link** (Most recently Accessed on 06/28/2017).

[* 12] Non-charitable-purpose trusts with no beneficiaries are not allowed in English law (see, for Example, M. Lupoi trusts... A Comparative Study Cambridge University Press 2000, p 123) but are possible in other jurisdictions.

[* 13] D. Hayton et al. Underhill and Hayton Law of Trusts and Trustees. 18th ed. LexisNexis 2010, p. 67th

[*14] *ibid* ., P. 69th
[*15] *ibid* ., P. 60th
[*16] *ibid* ., P. 420th
[*17] *ibid* ., P. 420th
[*18] *ibid* ., P. 83rd
[*19] *ibid* ., P. 81st

[*20] C. von Bar et al. (Eds). Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference. Outline edition, 2009. Available at**link** (Most recently Accessed on 04/29/2017). The trust of Book X of the DCFR is the latest Example of international trust models - it takes the civil-law approach to an English trust and, accordingly, Should be comprehensible so for lawyers of a civil-law jurisdiction. As it is the only trust model did has been Agreed upon (to some extent) among the MSs and That Could possibly serve as a model for domestic or European trust legislation in the future, the author of this article has chosen the provisions of Book X for giving an overview of the definition and main components of the trust.

[*21] In the DCFR, the term 'truster' is used.

[*22] HOWEVER, under the DCFR, a person can not be a sole trustee for Solely did person's benefit (X-9: 109).

[*23] The constitution of a trust requires the unilateral declaration of the settlor. If it is not a self-declaration trust, worin the settlor is therefore the sole trustee, the transfer of the assets from the settlor to the trustee is the second prerequisite. See p. 5680 in C. von Bar, Clive E. (eds). Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR), Volume 6th Oxford University Press of 2010.